NO. 87-1603

In the Supreme Court of the United States

OCTOBER TERM, 1987

JOSEPH A. ROMANO,

Petitioner,

VERSUS

MERRILL LYNCH, PIERCE, FENNER & SMITH, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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RULE 28.1 LIST OF RELATED COMPANIES

The parent company of respondents Merrill Lynch, Pierce, Fenner & Smith, Inc., Merrill Lynch Asset Management, Inc., and Merrill Lynch Futures, Inc. is Merrill Lynch & Co., Inc.

The subsidiaries of Merrill Lynch, Pierce, Fenner & Smith, Inc. are Broadcort Capital Corp., Merrill Lynch & Co., Canada Ltd., Merrill Lynch Canada Inc., Merrill Lynch Life Agency Inc., Merrill Lynch Princeton Inc., Securities Options Corp., and Wagner Stott Clearing Corp.

The subsidiaries of Merrill Lynch Assett Management Inc. are Merlease Leasing Corp., and Merrill Lynch Interfunding Inc.

TABLE OF AUTHORITIES

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This brief is respectfully submitted on behalf of Merrill Lynch, Pierce, Fenner & Smith, Inc. (Merrill Lynch), Merrill Lynch Commodities, Inc. (Merrill Lynch Commodities), Merrill Lynch Futures, Inc. (Merrill Lynch Futures), Merrill Lynch Asset Management, Inc. (MLAM), and Merrill Lynch Ready Assets Trust (MLRAT), (hereinafter collectively referred to as "respondents") in opposition to the petition of Joseph A. Romano for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.[1]

STATEMENT OF THE CASE

Mr. Romano initiated this case on July 20, 1984, in the federal court in the Eastern District of Louisiana.

[1] The decision of the court of appeals in *Romano v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 834 F.2d 523 (5th Cir. 1987), is *reprinted as* Appendix A of Mr. Romano's petition (hereinafter cited as "Appendix A") at A-1.

A class action was alleged in the complaint. The defendants named were Merrill Lynch, Merrill Lynch Futures, Merrill Lynch Commodities,[2] MLAM, and MLRAT.

Mr. Romano alleged vaguely in his complaint that MLRAT and its manager MLAM violated the securities laws by entering some sort of a conspiracy with the other defendants to churn or otherwise mishandle his funds in the silver futures market after withdrawal from his MLRAT account. He alleged that this claim was shared with a class consisting of other Merrill Lynch customers. Additionally, he claimed that Merrill Lynch and Merrill Lynch Futures "churned" commodity transactions in his account. Damages of $50,000 were alleged without the slightest reference to specific defendants or transactions.

Finding Mr. Romano's individual claim against them to be incomprehensible -- not to mention that of the so-called class alleged to be similarly situated -- respondents initially filed a motion for a more definite statement.

The trial judge granted the motion and Mr. Romano filed an Amended Complaint in which he simply listed seventy-five commodities trades in his account. No additional factual allegations clarifying his claims were made in the Amended Complaint. No violation of the Commodity Exchange Act has ever been alleged in the pleadings.[3]

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[2] On January 4, 1983, Merrill Lynch Commodities, Inc. changed its name to Merrill Lynch Futures, Inc.

[3] Mr. Romano's claims were plagued by confusion and inadequate pleading from the beginning of this litigation. In fact, the trial judge stated in his order of July 1, 1986 (*reprinted as* Appendix D of Mr. Romano's petition (hereinafter cited as "Appendix D") at A-23), that the "vagueness and lack of coherency of the plaintiff's pleadings" and the "lack of development in plaintiff's case continuously hampered the court's effort to resolve the issues presented to it." *Romano v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 638 F. Supp. 269, 271 (E.D. La. 1986), Appendix D at A-25.

Mr. Romano then moved for certification of the class. Respondents opposed certification of the class and MLRAT and MLAM moved for a summary judgment dismissing the claims against them. Additionally, Merrill Lynch and Merrill Lynch Futures moved for a partial summary judgment in their favor dismissing that portion of Mr. Romano's claim in so far as it was based on specific trades occurring prior to the period provided by the statute of limitations.

The trial judge considered all of these matters and denied certification to the class and dismissed the claims against MLRAT and MLAM. Additionally, the trial judge in three different orders dated December 6, 1985 (*reprinted as* Appendix C of Mr. Romano's petition (hereinafter cited as "Appendix C") at A-15), July 1, 1986 (*reported in Romano v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 638 F. Supp. 269 (E.D. La. 1986) and *reprinted as* Appendix D of Mr. Romano's petition (hereinafter cited as "Appendix D") at A-23), and September 12, 1986 (*reprinted as* Appendix E of Mr. Romano's petition (hereinafter cited as "Appendix E") at A-33), granted partial motions for summary judgment in favor of Merrill Lynch and Merrill Lynch Futures based on the statute of limitations.

Belatedly, over a year and a half after filing his Complaint and after the case had been set for trial, Mr. Romano filed a Second Amended Complaint which attempted to allege RICO violations. Merrill Lynch and Merrill Lynch Futures initially objected to the tardy filing of the RICO claim and the Magistrate dismissed it. However, Judge Schwartz reversed the Magistrate after Mr. Romano appealed and permitted the RICO claim to be filed. Ultimately, however, Judge Schwartz dismissed the Rico claim before trial on the basis of prescription and inadequate pleading.

A bench trial on the merits was held at which time the trial court considered the claim of Mr. Romano for churning of his commodities account. Mr. Romano, who conceded that he controlled the transactions in the account, could not specifically indentify a single transaction in his account which was unauthorized. Likewise, he presented no evidence of any specific loss attributable to the fault of respondents. After he had submitted his evidence, on the motion of respondents pursuant to Fed. R. Civ. P. 41(b), the trial court dismissed Mr. Romano's claim for lack of evidence demonstrating that he was entitled to any relief. *See* trial court opinion, Appendix F at A-39.

Mr. Romano appealed to the Fifth Circuit Court of Appeals. The Fifth Circuit Court of Appeals in its opinion discussed the "elusive" arguments of Mr. Romano in the light of the specific facts in the case and unanimously affirmed the decision of the district court. Apparently unhappy about the resolution of the issues by both the district and appellate courts, Mr. Romano now petitions this Court for a writ of certiorari for further review.

CRITERIA OF SUPREME COURT RULE 17 NOT MET

As a threshold matter it is clear from the face of Mr. Romano's petition for a writ of certiorari that the considerations set forth in Supreme Court Rule 17 are not present in this case.

Mr. Romano's petition presents no "special and important reason" for which this Court should exercise its discretion to review this matter. There is no indication from the petition that the Fifth Circuit Court of Appeals rendered a decision in conflict with a decision of another federal court of appeals on the same matter or in conflict with applicable decisions of a state or this Court, or that the Court of Appeals in its opinion so far departed from the

accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, Nor does Mr. Romano's petition disclose any substantial issues of federal law which have not been, but should be, settled by this Court. To the contrary, the questions presented for review by Mr. Romano are either unsupported and patently spurious issues or relate only to the application or well-settled law by the trial and appellate courts to the particular facts of this case.

DISCUSSION OF QUESTIONS PRESENTED FOR REVIEW

Though it is clear that Mr. Romano has not met his initial obligation to allege appropriate considerations for seeking this Court's review, respondents will briefly address Mr. Romano's contention that errors occurred in the proceedings below.

Respondents' response is hindered by the fact that Mr. Romano has continued his practice of presenting elusive, vague and wholly unsupported arguments. Indeed, we note that several of the ten questions presented for review are either not mentioned at all in his argument or they are so cursorily addressed that a separate response to each issue is not possible. We note further that insofar as Mr. Romano has raised issues and then completely failed to develop or support them in his argument that he has clearly violated Supreme Court Rule 21.5 which imposes on a petitioner the burden of presenting with "accuracy" and "clearness" support for issues raised.

a. Argument that District Judge Martin Feldman is disqualified from sitting on the Court of Appeals

Mr. Romano's first argument is that the participa-

tion by United States District Judge Martin Feldman on the Fifth Circuit Court of Appeals in this matter is improper because he is not authorized by law to sit on the Fifth Circuit and in any event he should be disqualified because of his alleged participation in formulating local pleading rules for RICO suits.

Mr. Romano cannot seriously dispute that the common practice of designating district judges to sit on the courts of appeals is specifically authorized by 28 U.S.C. §292(a) and that there is no authority holding such a statute unconstitutional. Likewise, it is equally frivolous for him to argue that Judge Feldman should be disqualified based on an allegation that he is somehow biased because of alleged participation in the formulation of local pleading rules. There is nothing in the record to even indicate what if anything Judge Feldman did with regard to formulating RICO pleading rules. But even assuming arguendo that he did assist in the formulation of such rules and that the rules reflect his legal opinion on proper RICO pleading, it is settled that this is no basis for his disqualification. A judge's view on legal issues has generally not been deemed sufficient to justify disqualification. *See United States v. Conforte,* 624 F.2d 869, 882 (9th Cir.), *cert. denied,* 449 U.S. 1012 (1980); *United States v. Azhocar,* 581 F.2d 735, 738 (9th Cir. 1978), *cert. denied,* 440 U.S. 907 (1979).[4]

We observe also that Mr. Romano raised his objection directed to Judge Feldman for the first time in his petition for a writ of certiorari to this Court after the case was decided. Obviously, Mr. Romano should not be permitted

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[4] Reference by Mr. Romano to *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813 (1986), is misplaced. In that case a justice on the Alabama Supreme Court was disqualified from sitting on a case involving an insurance company where the justice had a personal suit pending at the same time against another insurance company in which similar issues of law were involved.

to submit his appeal to the panel which heard the case and after learning of an unsuccessful result, complain that a district judge sitting by designation on the panel did so improperly or without authority. Mr. Romano had ample opportunity to challenge Judge Feldman's participation on the panel prior to decision of the case yet he failed to do so.

b. Argument that claims by Mr. Romano and the alleged class against MLRAT and MLAM were improperly dismissed

As best can be summarized, the second error alleged by Mr. Romano is that the securities laws and RICO claims against MLRAT and MLAM should not have been dismissed pursuant to their motions for summary judgment.[5] Mr. Romano alleged that MLRAT and MLAM were somehow responsible under the securities laws for Mr. Romano's (and the class members') losses in the silver market because (in concert with the other respondents) they withdrew money from MLRAT accounts and invested it in unsuitable and/or unauthorized silver investments to their sole benefit. He also argues that placing his idle funds in a MLRAT account created a claim for damages under the securities laws. Additionally, he attempted to allege in his Second Amended Complaint that the alleged violations of the securities laws by MLRAT and MLAM constituted predicate acts under the RICO statute.

In asserting claims against MLRAT and MLAM it is clear that Mr. Romano totally misconceived the functions of MLRAT and MLAM. Both of those parties moved for summary judgment based on uncontradicted facts set forth in affidavits, prospectuses and in *Gartenberg v. Merrill Lynch Asset Management, Inc.*, 528 F. Supp. 1038 (S.D.N.Y. 1981), *aff'd*, 694 F.2d 923 (2nd Cir. 1982), *cert.*

[5] Mr. Romano's assertion that it was error to dismiss the claims against MLRAT and MLAM appear to be broken down separately as items 3,4,5,8 and 10 in his "Questions Presented For Review."

denied, 461 U.S. 906 (1983).

The Fifth Circuit considered Mr. Romano's claims against these parties and found from the record, as did the trial judge, that it was "clear that neither MLRAT nor MLAM was in any way even remotely involved in Mr. Romano's silver futures trades." Appendix A at A-7. Furthermore, both courts found that it appeared that Mr. Romano actually benefited from the investment of his idle funds in his MLRAT account, and could show no loss. *Ibid.* at n.10. Thus, finding the motions for summary judgment of MLRAT and MLAM to have merit and the record barren of any evidence asserted in opposition to the motions for summary judgment, the Fifth Circuit properly affirmed the trial court's judgment dismissing MLRAT and MLAM.

Having found that Mr. Romano's securities laws claims against MLRAT and MLAM had no merit, the Fifth Circuit then concluded that he and the alleged class had no basis for alleging MLRAT transactions as predicate acts under the RICO statute.[6] Accordingly the Fifth Circuit affirmed the trial court's dismissal of the RICO claims based on alleged securities law violations.

c. Argument that statute of limitation was improperly applied to churning claim

The next argument advanced by Mr. Romano is that the Fifth Circuit erred in affirming the trial court's application of the statute of limitations to Mr. Romano's commodities churning claim.

Specifically, Mr. Romano takes issue with the conclusion reached by the trial and appellate courts that the

[6] The Fifth Circuit found that Mr. Romano failed to meet the requirements of class certification. *See* Appendix A at A-13. He could not identify other class members or any common questions of fact or law. Indeed, his inability to show any loss of his own qualified him as a class representative.

statute of limitations commenced to run against his churning claim when he received notice of the commodities transactions in his account through the receipt of confirmation notices and monthly statements. In rejecting Mr. Romano's argument, the Fifth Circuit noted that in applying the statute of limitations in churning cases, a court should consider the entirety of transactions and the sophistication of the plaintiff in each case. It then noted that Mr. Romano was "not an unsophisticated investor" who was caught unaware of the trading activity in his account. Appendix A at A-9. Indeed, he had directed the activity in the account himself. Furthermore, the Fifth Circuit noted that respondents had raised the statute of limitations defense through a motion for summary judgment and that Mr. Romano had not exercised his opportunity to oppose the motion by presenting evidence of his ignorance of the facts. In connection with its application of the statute of limitations to Mr. Romano's claims, the Fifth Circuit made it clear that it was not announcing any new principle of law, but that its decision was based only on the facts of this case. *Ibid.* The court said:

> Our decision today is fact-specific and deals only with the facts in this record. The district court also ruled only on the facts.

Ibid. at n.12.

d. Argument that improper commodities trading violates RICO statute

The next issue raised by Mr. Romano is that the trial court erred as a matter of law in stating in its order dated July 1, 1986, that improper activity in his commodities account could not constitute a predicate act under the RICO

statute.[7] Appendix D at A-32. While it is true that the trial court reached this conclusion in its July 1, 1986 order when it dismissed Mr. Romano's RICO claim based on commodities trading, Appendix D at A-32, the correctness of that decision is now moot because at the trial Mr. Romano could prove no underlying improper activity in his commodity account which would constitute a predicate act (assuming arguendo that the RICO statute applies to commodity trading.)

The Fifth Circuit, in its footnote 8, Appendix A at A-5, specifically dealt with this isue, and properly held that since Mr. Romano had completely failed to prove any churning in his commodities account the RICO issue was moot.

e. Argument that Merrill Lynch breached a fiduciary duty to Mr. Romano

Finally, Mr. Romano alleges that Merrill Lynch breached a fiduciary duty owed to him by handling his transactions in the silver futures market without disclosing that Merrill Lynch was a defendant in a lawsuit entitled *Minpeco S.A. v. ContiCommodity Services, Inc.*, 552 F. Supp. 327 (S.D.N.Y. 1982) wherein it is alleged that Merrill Lynch and others engaged in improper activity in the silver market.

This contention is apparently an after-thought by Mr. Romano and there is no evidence in the record relating the issues in that lawsuit to the trading in Mr. Romano's account.

Reference to the cited opinion of the district judge in

[7] 18 U.S.C. §1961(1)(D) specifically provides that securities laws violations can serve as RICO predicate acts. No mention is made in the RICO statute of commodities laws violations serving as predicate acts.

the *Minpeco* case has no evidentiary significance since it deals solely with preliminary motions to dismiss filed by several of the defendants challenging the adequacy of the plaintiff's pleadings. There are no findings in that opinion of any culpability by Merrill Lynch. Hence, there can be no basis for any fiduciary duty owed to Mr. Romano to disclose the subject matter of the allegations in the *Minpeco* case.

CONCLUSION

Respondents consider that it is beyond doubt that the claims asserted by Mr. Romano, which have now been rejected by both the trial and appellate courts, are totally without merit and do not warrant review by this Court.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENTS

Dated: New Orleans, Louisiana
May 25, 1988

CERTIFICATE OF SERVICE

I hereby certify that copies of the Respondents' Brief in Opposition were served on all parties of record by depositing same in the United States mail, first-class postage prepaid and properly addressed to Stephen J. Caire, 218 E, Gibson Street, Covington, Louisiana 70433, this 25th day of May 1988.

WILLIAM R. FORRESTER, JR.